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No. 94-1384

In the

Supreme Court of the United States

October Term, 1994

RICHARD REAHARD and ANN P. REAHARD,
Petitioners,

v.

LEE COUNTY, FLORIDA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000

supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated as amicus curiae in this case in the court below, and attorneys for PLF have participated in numerous land use takings cases before this Court and other courts representing both amici curiae and property owner parties. For example, PLF attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF has participated as amicus curiae in other takings cases before this Court such as *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of property rights will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In November, 1984, upon the death of his mother, petitioner Richard Reahard inherited a 40 acre tract of land in Lee County, Florida. For over two decades this land had been zoned for subdivision into single-family residences, and would have accommodated 126 homes under the allowable density. Petition for Writ of Certiorari (Petition), dated February 16, 1995, at 10. The next month, Lee County's Comprehensive Land Use Plan (Lee Plan) became effective, *Reahard v. Lee County*, 30 F.3d 1412, 1413 (11th Cir. 1994) (*Reahard III*). The Lee Plan designated petitioners' property (and only petitioners' property, as all surrounding lots had already been developed) as a resource protection area (RPA). Petition at 10. As an RPA, petitioners' land could only be used for a single residence or a "recreational, open space or conservation area." *Reahard III*, 30 F.3d at 1413.

In January, 1988, petitioners applied to the Lee County Board of Commissioners (Board) for an amendment to the Lee Plan upzoning their property, *Reahard III*, 30 F.3d at 1413, and were denied in January, 1989. *Reahard v. Lee County*, 968 F.2d 1131, 1133 (11th Cir. 1992) *(Reahard I)*. On September 1, 1989, petitioners pursued their remedies in Florida state court, filing a complaint that alleged that the Lee Plan's RPA classification resulted in a taking of their property without payment of just compensation in violation of the Florida and United States Constitutions. *Reahard III*, 30 F.3d at 1414. Respondent filed an answer alleging, *inter alia*, that the claim was not ripe, and then removed the case to the United States District Court for the Middle District of Florida. *Reahard I*, 968 F.2d at 1133.

While the case was pending in federal court, petitioners sought an "administrative interpretation" of the Lee Plan by the Board to allow greater use of the property than allowed

as an RPA, but were denied by the Board on September 19, 1990. *Reahard III*, 30 F.3d at 1416. In November, 1990, the United States magistrate judge presided over a three-day bench trial on the issue of liability for a taking. On January 16, 1991, he issued an order determining that petitioners' property was taken without payment of just compensation. *Reahard I*, 968 F.2d at 1133-34. The issue of damages went before a jury on May 7, 1991, which returned a $700,000 verdict for petitioners, plus interest.

The Eleventh Circuit reversed this judgment on appeal, remanding to the trial court with instructions to reconsider the takings legal analysis and to render more detailed findings of fact. *Reahard* I, 968 F.2d at 1136-37. Nearly four months later, the Court of Appeals issued an "Addendum" to this opinion, further instructing the magistrate judge to consider whether the ripeness requirements of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. at 194, were satisfied. *Reahard v. Lee County*, 978 F.2d 1212, 1213-14 (11th Cir. 1992) (*Reahard II*). On remand, the District Court reinstated the judgment, and this was again appealed. The Eleventh Circuit reversed the District Court, *Reahard III*, 30 F.3d at 1418, finding a lack of federal jurisdiction because the takings claim under the United States Constitution had not yet ripened: "[U]ntil [petitioners] have pursued their state remedy, the federal courts are without subject matter jurisdiction." (Footnote omitted.) Thus, even though petitioners pursued their state remedy by filing their complaint in state court, and the state government defendant chose to remove the case to the federal court, the property owners' five-year old litigation that resulted in a $700,000 judgment in the forum of respondent's choice was thrown out the window. *Williamson County* does not and cannot require such a result.

SUMMARY OF ARGUMENT

This Court should grant the petition for writ of certiorari to clarify the meaning of *Williamson County*'s second ripeness factor for regulatory takings. Because the Fifth Amendment does not block government from appropriating property, but instead requires that just compensation be paid when this is done, the *Williamson County* Court was of the belief that, to ripen a federal takings claim, property owners must "seek compensation through the procedures the State has provided for doing so," 473 U.S. at 194, and be denied compensation.

It is not clear whether this requires that the pursuit of state law remedies be in state court. But even assuming that it does, this ripeness factor was satisfied when the petitioners filed their complaint in state court seeking compensation under both the state and federal Constitutions. By removing the case to the federal District Court, the government defendant denied the property owners compensation in the state forum just as assuredly as if the government had prevailed on the merits. Thus, the case turns on whether removal was proper.

Removal was proper if the federal claim existed in the state court proceeding. Under the Eleventh Circuit's reading of *Williamson County*, the federal claim ripens only upon final denial of compensation under state law, after all appeals are exhausted. But this conflicts with the typical approach of state courts, which is to decide takings claims under state *and* federal law simultaneously. The Eleventh Circuit's decision requires one to accept the concept that a federal constitutional claim can, at the same time, be ripe for review in state courts but not in federal courts--a decision

which exposes property owners to the risk that state court res judicata principles will bar subsequent litigation of the federal claim even if the claim is not raised in state court. Thus, the ultimate issue is whether a fundamental federal right, guaranteed by the Fifth Amendment, can ever be decided by a federal court.

Even if property owners can preserve the federal claim to be decided by a federal court, the Eleventh Circuit decision requires a redundant, inefficient, and absurd procedure. The property owners are to return to the forum they originally selected to retry the matter. If the state court denies them compensation, then they have a ripe action to bring back into the federal court--which has once before determined that the government must pay compensation in excess of $700,000. Assuming the prior District Court decision was right as a matter of law, this extra step makes no difference to the government entity, which will ultimately pay. But it does matter to property owners, who may lack the resources to try cases in two separate courts and would prefer the option to bring both state and federal claims at the same time.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

FILING A TAKINGS CLAIM UNDER STATE LAW IN STATE COURT SATISFIES WILLIAMSON COUNTY'S RIPENESS REQUIREMENT

In *Williamson County*, 473 U.S. at 192-95, this Court adopted two concepts of ripeness for use in cases brought

against state and local governments that allege that regulations as applied to a particular property violate the owner's Fifth Amendment rights to just compensation (as applied to the states through the Fourteenth Amendment). First, there must have been a final determination by the state decision maker on the uses that the regulations will allow for the property owner's land. *Id.* at 186. Second, since property may be taken provided that just compensation is paid, the property owner must first pursue compensation through available state remedies and be denied in order to have a claim that property was indeed taken without payment of just compensation. *Id.* at 195.

The Eleventh Circuit's ruling in this case clearly conflicts with *Williamson County*, which held, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County*, 473 U.S. at 195.

This Court has not yet determined whether this second ripeness requirement is satisfied when a property owner pursues state law remedies in a federal court. But without question, petitioners did submit their state law takings claim to a state trial court for determination along with their federal takings claim. *Reahard III*, 30 F.3d at 1414. They were not successful in receiving just compensation in the state court proceedings--because respondent elected to remove the case to federal court. *Id.* Respondent at once deprived petitioners of the chance to receive just compensation through state court procedures and deprived themselves of the "home court advantage" that *Williamson County* encourages.

Under *Williamson County*, if a state does not provide a means by which compensation can be sought, then a federal

takings claim can be brought directly in federal court. 473 U.S. at 197. The converse is not true, and the mere availability of a state law remedy does not prevent property owners from subsequently filing federal takings claims in federal court after compensation is denied under state law. *Williamson County* stated this clearly: "Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and *until it has utilized that procedure, its taking claim is premature.*" 473 U.S. at 196-97 (emphasis added). This does not mean, however, that the federal takings claim cannot be brought concurrently with the state claim in state court. Nothing in *Williamson County* would preclude a state court from deciding both claims simultaneously. In fact, this appears to be the standard procedure. *See, e.g., McFillan v. Berkeley County Planning Commission*, 438 S.E.2d 801, 809 (W. Va. 1993); *D'Addario v. Planning and Zoning Commission of the Town of Darien*, 593 A.2d 511, 513 (Conn. App. Ct. 1991); *Buskey v. Town of Hanover*, 577 A.2d 406, 408-09 (N.H. 1990); *Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo. 1990). This is exactly what the Reahards sought to do.

The Eleventh Circuit's decision that no federal claim was present to provide it subject matter jurisdiction over the case, *Reahard III*, 30 F.3d at 1418, means that the federal claim does not ripen upon the filing of a state takings claim, but only upon the final denial (after appellate activity) of compensation under state law in state court. This approach was rejected by this Court in its review of *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d 798, in which the federal and state takings claims were brought concurrently in state court. *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 902 (1991) (Harwell, J., dissenting). If the federal claim did not ripen until the South Carolina Supreme Court denied compensation, then this Court could not have

heard the matter, as it was brought on writ of certiorari and not under original jurisdiction. *Lucas*, 120 L. Ed. 2d at 809.

That many property owners, forced into state court by *Williamson County*, choose to litigate federal claims at the same time is understandable. Although to many property owners the right to have federal claims reviewed in a federal court is inalienable, to others the high cost of litigation in terms both of time and money lead them to accept the idea of a single state forum for efficiency's sake. Allowing for both state and federal takings claims to be tried together is sensible from the perspective of the state courts, too. Since these courts will want to construe their own constitutions and statutes in a way to avoid violating the United States Constitution, federal questions may well find their way into the state cases even if federal causes of action are not litigated. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 313 n.8 (although complaint raised only state takings claim, validity of state rule on compensation was considered under federal Constitution).

Williamson County, properly read, is satisfied when property owners seek compensation under state takings law in state court. They should have the option of reserving their federal takings claims for determination in federal court, after the state case has run its course, if they fail to receive just compensation in state court. *See Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1306 (11th Cir. 1992). Another option would be to litigate the federal claims in the state court proceeding. This concurrent approach provides the state government defendant with an option of its own: whether to remain in state court or immediately remove the case to federal court. Respondent below chose the latter.

Unless this Court grants the petition for writ of certiorari and settles the matter, this issue will continue to vex property owners and governmental entitites. The former will not know if they should include the federal claim in state court filings and the latter will not know if removal is proper. Removal to federal court was attempted in one case amicus is currently litigating in the State of Washington, *Pang v. City of Seattle*, No. C95-308R (W.D. Wash.), as well as in Mrs. Dolan's lawsuit filed in the Oregon trial court seeking compensation for the exaction reviewed by this Court in *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994); No. 95-96AS (D. Or.). If the property owners in such cases move unsuccessfully for remand (back to the state court), they risk going through a federal trial for naught if the Court of Appeals treats them as the Eleventh Circuit did the Reahards. But to avoid removal by reserving the federal claims (if such an act is recognized in that federal circuit) forces the property owners involuntarily to split their cases into two different courts. Their lack of financial resources to litigate the case in more than one forum might have been the reason for choosing to file both types of claims in state court, rendering them particularly vulnerable to such a running up of time and resources.

The case below is a good example of the dangers these citizens face. After five years of litigation, the Reahards would find themselves back at square one, in a trial court for another determination of the facts and application of the law. If they receive just compensation under state law in the state courts, then there has been no taking under federal law, but the respondent pays nevertheless. If they fail to receive compensation in the state courts, this is a Pyrrhic victory for respondent because the federal cause of action is then ripe for litigation in federal court (which found $700,000 in liability

the last time).[1] Thus, unless the facts are determined totally at odds with those already adduced in the district court, the ultimate result will be a finding of respondent's liability no matter which Constitution requires it. But petitioners may not have the resources to continue that far, in terms of dollars, time, or even emotional strength. Such a roundabout, duplicative procedure cannot be what was envisioned by *Williamson County*.

II

FAILURE TO CONSIDER A FEDERAL TAKINGS CLAIM RIPE WHEN JOINED WITH A STATE TAKINGS CLAIM IN A STATE COURT PROCEEDING RESULTS IN CIRCUIT CONFLICTS AND PROCEDURAL CHAOS

The Eleventh Circuit has determined that the joining of a takings claim under federal law with a takings claim under state law does not ripen the federal claim either upon filing in state court or upon removal to federal court. As explained above, this view requires property owners to go through two complete cases litigated in two different court systems in

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[1] In the takings context, the Fourteenth Amendment's Due Process Clause (and thus the Fifth Amendment) is not satisfied by a state's mere provision for procedures in which to seek compensation. This Court has always held, from the very beginning of Fourteenth Amendment takings jurisprudence, that the process that is due when property is appropriated is a process that *results* in receipt of just compensation. *See Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 234-41 (1897). Thus, it is the failure to receive just compensation, not the lack of a process in which to pursue it, which constitutes the violation.

order to have their rights under the United States Constitution determined.

This approach provides little comfort to property owners lacking the resources to litigate two separate cases, but at least reassures property owners who want a federal forum for their federal claims. This reassurance is predicated on the Eleventh Circuit's opinion in *Fields*, 953 F.2d at 1306-07, which adopted for takings cases the procedure created by this Court in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1964). *England* provides to parties, forced to litigate their cases involuntarily in state court due to a stay of federal court proceedings, a mechanism for preserving their federal claims for a federal forum: an explicit statement on the record in the state court reserving the federal issues for federal court determination. *England*, 375 U.S. at 421. In *Fields*, the Eleventh Circuit recognized that *Williamson County* might similarly force parties involuntarily into state court, and that an *England*-type reservation is warranted. 953 F.2d at 1306.

If other Circuit Courts are to follow the Eleventh Circuit in holding that federal takings claims are not ripe for federal court review until state judicial proceedings determining state takings claims have been completed, then a *Fields* reservation must be allowed to enable the property owners to litigate their federal constitutional rights in federal court. Provided that a "full and fair opportunity" to litigate the facts of the case is provided in state court (*Allen v. McCurry*, 449 U.S. 90, 95 (1980)), the collateral estoppel

effect of the factual determinations is of little concern.[2] But the interpretation of rights under the United States Constitution should not be kept from United States courts. As the *Fields* decision noted:

> Indeed, it would be a very odd result if the federal courts were effectively barred from hearing claims arising under the takings clause, except through Supreme Court review via the writ of certiorari, of state court decisions interpreting the clause. ... [T]he question is whether the citizens of this country are to be barred from ever vindicating a federal constitutional right through the federal court system.

Fields, 953 F.2d at 1307 n.8.

Other circuits, however, have indicated that they might reject the concept of a *Fields* reservation. The Ninth Circuit, in *Mission Oaks Mobile Home Park v. City of Hollister*, 989 F.2d 359, 362 (9th Cir. 1993), refused to recognize a reservation that was filed in state court over one year after the state complaint, which included federal claims, was filed. The Ninth Circuit affirmed the dismissal of the federal case on *Younger* abstention grounds (*see Younger v. Harris*, 401 U.S. 37 (1971)), and quoted dictum stating that a reservation of federal claims cannot be made when a federal

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[2] At least one court has determined that a takings claim cannot be limited to review of an administrative record due to procedural inadequacies of the agency hearing process. *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1178 (1994). If other states have similarly inadequate hearings, the record from those hearings cannot be the basis for state court factual determinations.

case was dismissed under *Younger*. 989 F.2d at 362. *See also Peduto v. City of North Wildwood*, 878 F.2d 725, 729 n.5 (3d Cir. 1989) (dictum indicating *England* reservation does not apply if state case is filed first). This is significant, for the pendency of a state action prompted the abstention in a federal case that included a substantive due process claim that was not included in the state action. *See Mission Oaks Mobile Home Park v. City of Hollister*, 788 F. Supp. 1117, 1119 (N.D. Cal. 1992). *Mission Oaks* implies that property owners possessing federal claims in addition to takings claims (such as due process or equal protection claims) cannot litigate these in a federal forum if they choose to ripen their takings claim in state court.

Even worse, the Ninth Circuit has also held that res judicata can bar property owners from litigating federal takings claims in federal court after unsuccessfully pursuing state takings claims in state court, because the federal claims "could have been asserted" in the state proceeding. *Palomar Mobilehome Park Association v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993); *but see Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993). *Palomar* appears to be based on a contrary interpretation of *Williamson County* than that of the court below, the Ninth Circuit finding *Williamson County* satisfied when a "plaintiff take[s] its takings claim to state court," *Palomar*, 989 F.2d at 364, rather than upon completion of state judicial proceedings.

Palomar, however, flatly contradicts *Williamson County* by stating, "[w]hile every litigant deserves his or her day in court, few deserve two." 989 F.2d at 365. The point of *Williamson County* was not that property owners "deserve" to have a second day in court, but that they should be burdened with the "first day" in court by first seeking compensation through state remedies. Although the plaintiff

in *Palomar* did not assert its federal claims in the state proceeding, the Ninth Circuit found these to be extinguished by termination of the state proceeding. *Id.* Incredibly, it cited as support the *Peduto* case, in which the federal claims *were expressly litigated* in state court, *see Peduto*, 878 F.2d at 726-27, and *Fields*, which rejected the notion that property owners must be limited to a state court determination of their federal constitutional rights, *see Fields*, 953 F.2d at 1307 n.8. *Palomar*, 989 F.2d at 364-65. The *Reahard III* approach to ripeness, and the *Fields* approach to the right of a federal forum, appears to be in direct conflict with the Ninth Circuit's *Palomar* decision.

The ripeness issue affects many more rights than the right to receive just compensation. The Circuits are split over whether the *Williamson County* requirement that property owners seek compensation under state law applies to related nontakings claims under the Fourteenth Amendment. At least three Circuits have held that it does, *see Gamble v. Eau Claire County*, 5 F.3d 285, 288 (7th Cir. 1993) (substantive due process); *J.B. Ranch, Inc. v. Grand County*, 958 F.2d 306, 309-10 (10th Cir. 1992) (procedural due process); *Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154, 158-60 (6th Cir. 1992) (equal protection and procedural due process), while one has held that it does not, *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1404-07 (9th Cir. 1989) (procedural and substantive due process). Thus, the ruling below may prevent property owners from litigating any federal rights in just one legal proceeding. To bring some order out of this chaos and help settle these conflicts, this Court should grant the petition for writ of certiorari.

CONCLUSION

Williamson County's requirement that property owners pursue state compensation remedies in order to ripen a federal takings claim is satisfied when the property owners file a complaint in state court under state law. The removal of such a complaint by the government defendant effectively deprives the property owners of compensation in the state forum, and places the determination of liability under both federal and state law in the hands of the federal courts. After the government has removed a takings case to federal court and then lost on the merits, it would be inefficient, counterproductive, and unfair to force the property owners to go through the entire proceeding again in the original forum they selected. The Eleventh Circuit's ripeness determination in this case contradicts *Williamson County*, and is also contrary to *Lucas* and numerous state court decisions allowing state and federal takings claims to be brought concurrently.

For these reasons, and to help solve a number of procedural uncertainties faced by property owners seeking to vindicate their federal constitutional rights, amicus respectfully requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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